

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No.

78-1359

FERIDUN GUNDUY,

Petitioner,

—against—

THE UNITED STATES OF AMERICA.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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March 2nd, 1979

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Petitioner Feridun Gunduy respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on February 7th, 1979.

Opinion Below

No opinion was rendered by the United States Court of Appeals for the Second Circuit. The judgment of that court appears in the Appendix hereto at page 1a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on February 7th, 1979. This petition for certiorari is being filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether a defendant, engaged in an otherwise legitimate medical practice, can be convicted of violating Section 841(a)(1) of Title 21, United States Code, without proof that he trafficked in drugs outside his professional practice?

Statutory Provisions Involved

Title 21, United States Code, Section 841(a)(1) states as follows:

"§841. Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . ."

Statement of the Case

During the period covered by the indictment in the case at bar, petitioner Feridun Gunduy, a physician licensed to practice in the State of New York and registered by the federal government to dispense controlled substances, was engaged in the private practice of medicine, specializing in bariatrics, the treatment of obesity. (A 195; 800-801)* To this end, he operated two offices staffed by approximately ten to twelve professional and non-professional personnel. Petitioner's practice flourished as indicated by the approximately 1,200 to 1,300 patients that were treated

* The letter "A" refers to petitioner's appendix filed in the Second Circuit Court of Appeals.

each week by the four doctors in attendance. (A 416-417; 472)

The investigation of Dr. Gunduy, which resulted in the present indictment, began on April 14th, 1976. On the previous evening, Eugene Biscardi, an individual who performed the functions of a physician in petitioner's offices, had been arrested by agents of the Drug Enforcement Administration for the sale of some 5,000 amphetamine capsules to an undercover agent. It was uncontroverted that Biscardi had stolen the pills from one of Dr. Gunduy's offices without petitioner's knowledge or complicity. Two compliance investigators from the Drug Enforcement Administration went to petitioner's office the following day to inform him of Biscardi's arrest. (A 352-353)

When questioned about Biscardi's duties, Dr. Gunduy told the investigators that Biscardi was his assistant but that he, Biscardi, was not a doctor licensed to practice medicine because the medical school he had attended had not been properly accredited. Petitioner stated, however, that Biscardi was awaiting New York license reciprocity. (A 911-912; 966-975; 999-1000) Indeed, all of petitioner's employees, including Dr. Eschwege, who worked side-by-side with Biscardi, believed him to be a physician. Biscardi even displayed a medical diploma on his office wall. (A 148; 196; 217; 502; 507; 567; 605-606; 735)

The investigators estimated that during the fourteen months Biscardi worked for petitioner, he must have "dispensed" 250,000 Delcobese pills, on the basis of employment records, as well as the average number of amphetamine capsules assumed by the investigators to have been dispensed daily by each of the four doctors working for petitioner. (A 908-910; 957-959; 1012) A similar computation was done for Naheed Hayat, a Pakistani physician who was not licensed to practice in New York, but who

treated petitioner's patients and prescribed medication. Consequently, based upon Hayat's ten months of part-time employment, it was estimated that she had "dispensed" 25,000 units of Delcobese. (A 960; 1007-1008)*

Counts One and Two of the indictment charged that petitioner had conspired with Biscardi and Hayat, non-practitioners, to unlawfully distribute controlled substances. Counts Three and Four charged that Petitioner aided and abetted Biscardi's possession and distribution of 250,000 Delcobese pills.

The government's evidence revealed that petitioner adhered to a fixed procedure for determining the advisability and course of treatment with regard to new patients. Each new patient was weighed, had his blood pressure taken and filled out a detailed questionnaire concerning his previous medical history. As a rule, he or she would also be given blood and urine tests. It was not until these preliminary steps had been completed that the patient would see petitioner or one of his associates. The patient would then be questioned, examined and given several pieces of literature concerning weight control. (A 210-212; 427; 553; 603; 715-716; 718-719; 741) In about ninety percent of the cases, medication was prescribed to treat the patient's overweight condition. Sixty to seventy-five percent of this medication was Delcobese, an amphetamine used for the treatment of obesity. (A 153; 198; 473; 557)

If medication had been deemed by the physician to be the best course of treatment, he would fill out an inter-office memorandum slip containing the patient's name, the medication, the dosage and the fee for the visit. The pa-

* Because the government failed to introduce sufficient evidence that Hayat had prescribed Delcobese, the trial court granted petitioner's motion for acquittal upon Count Two, the only count pertaining to her. (A 1329)

tient would then take this "slip" to a woman at the so-called dispensing desk in the reception area of the office, who would give the patient the indicated medication which had already been packaged by the staff into vials of twenty-one pills each. The patient at this point was supposed to sign a dispensing sheet acknowledging receipt of the medication. The employee at the desk would then fill in the dosage in one of several columns on these sheets, depending upon the strength of the particular medication dispensed. (A 83-84; 151-153; 199-200; 456-457; 541)

Reasons for Granting the Writ

This case, it is respectfully submitted, raises a serious question regarding the proper statutory interpretation and application of a provision of the Controlled Substances Act (84 Stat. 1242, 21 U.S.C. §§ 801 *et seq.*), Title 21, United States Code, Section 841(a)(1).

The Controlled Substances Act was designed to prevent the diversion of controlled substances "from legitimate to illegitimate channels." *United States v. Rosenberg*, 515 F.2d 190 (9th Cir. 1975), *cert. denied*, 423 U.S. 1031 (1975). To achieve this end, Congress created an elaborate system for the registration of those authorized to manufacture, sell, dispense or otherwise distribute controlled substances, as well as for the maintenance of records covering the transfer of such substances. In addition, Congress provided severe penalties for any unauthorized distribution or dispensing.

This Court, however, in *United States v. Moore*, 423 U.S. 122 (1975), held that duly licensed practitioners who are registered by the Attorney General and, therefore, authorized to dispense controlled substances in conformity with the Act, possess a limited immunity from prosecution

under § 841(a)(1). A practitioner, otherwise immune, becomes subject to the harsh penalties of § 841(a)(1) when the dispensation or distribution of controlled substances falls outside the scope of a legitimate medical practice and amounts to common "drug pushing." It is asserted, therefore, that *Moore* stands for the proposition that when a drug dealer "masquerades" as a physician and uses his profession as nothing more than a front for his illegal activities, the sanctions embodied in § 841 may be utilized against him.

Such was emphatically not the situation in the case at bar. Absolutely no evidence of drug trafficking on the part of petitioner was presented by the government. On the contrary, the uncontradicted testimony of the government's own witnesses tended to establish that petitioner possessed an extensive, highly successful, legitimate medical practice, specializing in the treatment of obesity. Patients were uniformly treated in accordance with fixed medical procedure. In this regard, upon a patient's first visit to one of petitioner's offices, he or she was required to complete an extensive questionnaire concerning previous medical history and various tests were routinely administered.

The government, wholly unable to establish that petitioner was the type of "drug pusher" contemplated by *Moore*, nevertheless sought to trigger the applicability of § 841(a)(1) by charging him thereunder as a consequence of his employment of two non-practitioners who illegally distributed controlled substances. Petitioner respectfully submits that a practitioner cannot lawfully be convicted of violating § 841(a)(1) simply upon a showing that he agreed with or aided a person, who was not authorized to distribute controlled substances, to distribute the same without additional proof that the distribution agreed to or aided in was completely outside the practitioner's legitimate

practice and, in effect, was nothing more than illicit drug trafficking. To permit such prosecutions and convictions would be to frustrate Congress' clear intent to exempt practitioners from the coverage of § 841(a)(1) absent a showing of drug trafficking.

For these reasons, the correctness of the decision below is open to serious question. What is more, the case at bar presents this Court with a unique opportunity to clarify this ambiguity within the context of *Moore, supra*, and to set forth unequivocal criteria for the prosecution of licensed practitioners under § 841(a)(1).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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ANNE C. FEIGUS
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March 2nd, 1979

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

78-1372

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of February one thousand nine hundred and seventy-nine.

Present:

HON. WALTER R. MANSFIELD,

HON. WILLIAM H. TIMBERS,

Circuit Judges,

HON. HENRY F. WERKER,

District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FERIDUN GUNDUY,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

Appendix

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

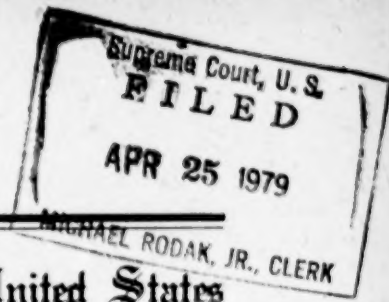
ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court.

A. DANIEL FUSARO,
Clerk

By:

ARTHUR HELLER,
Deputy Clerk

No. 78-1359



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FERIDUN GUNDUY, PETITIONER

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UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
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THE SECOND CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1359

FERIDUN GUNDUY, PETITIONER

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UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
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THE SECOND CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioner contends that since he is a licensed physician, he was improperly prosecuted under 21 U.S.C. 841(a)(1) for aiding and abetting illegal distribution of controlled substances.

1. After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to possess and distribute a Schedule II controlled substance, in violation of 21 U.S.C. 846 (Count 1); aiding and abetting the illegal possession, with intent to distribute, and the distribution, of a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Counts 3 and 4); knowingly omitting material information from and furnishing fraudulent information in documents required to be kept under 21 U.S.C. 827(a), in violation

of 21 U.S.C. 843(a)(4) (Counts 5, 6, and 8); and obstruction of justice, in violation of 18 U.S.C. 1503 (Count 9).¹ Petitioner was sentenced to concurrent terms of 18 months' imprisonment on each count, a special parole term of five years, a fine of \$15,000 on each of Counts 1, 3, 4, 5, 6 and 8, and a fine of \$5,000 on Count 9. The court of appeals affirmed (Pet. App. 1a-2a).

On the evening of April 13, 1976, Eugene Biscardi was arrested by Drug Enforcement Administration (DEA) agents, following his sale of 5,000 Delcobese amphetamine capsules to Richard Rubin, a pharmacist who was then acting as a government agent (A. 405).² At the time of Biscardi's arrest it was determined that he was an employee of petitioner, who was a medical doctor (A. 394). On the morning following Biscardi's arrest, several DEA agents began a routine investigation of petitioner's business records (A. 236, 802).³

The investigation disclosed that petitioner maintained two offices for the treatment of obesity (A. 36, 195). He employed a number of physicians who saw and treated 1,400 patients weekly; 75 percent of the patients were receiving Delcobese (A. 153, 548). Rather than going to a pharmacy, petitioner's patients received these drugs at petitioner's offices. The

¹Although petitioner was found guilty on all nine counts of the indictment, the district court subsequently dismissed Counts 2 and 7.

²"A." refers to the Appendix on appeal.

³No evidence was elicited at trial suggesting that petitioner participated in or was even aware of Biscardi's street distributions.

examining physician would fill out an inter-office memo stating the amount of medication, and the patient would present this at the dispensing desks and receive the medication (A. 197, 201).

Biscardi was employed by petitioner to see and treat patients. The testimony at trial established that petitioner's employees, as well as his patients, regarded Biscardi as a medical doctor (A. 147-149, 196, 201, 475, 501-504), and that petitioner told them that Biscardi was a physician (A. 504). Biscardi prescribed Delcobese (A. 201, 502, 908-910) and even had his own patients, who routinely asked for him and were treated by him with Delcobese (A. 204). Biscardi was not licensed to practice medicine, however, nor was he registered to prescribe Delcobese (A. 787), and petitioner knew this (A. 911-912). Petitioner's actions in assisting Biscardi's unauthorized dispensing of controlled substances through petitioner's practice was the basis of Counts 1, 3 and 4 of the indictment.⁴

2. Relying on *United States v. Moore*, 423 U.S. 122 (1975), petitioner contends (Pet. 5-7) that a medical doctor can be convicted under 21 U.S.C. 841(a)(1) only if he "uses his profession as nothing more than a front for his illegal activities" (Pet. 6). He argues (*ibid.*) that since he "possessed an extensive, highly successful, legitimate medical practice," he cannot be prosecuted under Section 841(a)(1).

⁴There was also substantial evidence that petitioner failed to keep adequate records and falsified records to conceal substantial discrepancies in inventories of controlled substances. These actions formed the basis of his convictions on Counts 5, 6, and 8. In addition, he falsified his accounts after the DEA investigation of his operations began; this action formed the basis of his conviction for obstruction of justice (Count 9). Petitioner does not challenge these convictions in this Court.

But *Moore* makes it plain that the "activities of registered physicians are [not] exempted from the reach of §841 simply because of their status." 423 U.S. at 131-132. Physicians are subject to prosecution for violating Section 841 to the extent that they "exceed[] the bounds of 'professional practice.'" 423 U.S. at 142. In any event, *Moore* was a case in which the controlled substance was being dispensed by the defendant himself, who claimed he was doing so in the course of his medical practice. Here, on the other hand, it is undisputed that Biscardi was not a physician, yet was engaging in the illegal possession and distribution of controlled substances. Assisting an individual known to be unlicensed and unregistered in that individual's criminal distribution of amphetamines⁵ is in no manner an aspect of the "professional practice" of medicine. Petitioner's actions, accordingly, did not fall within the exception contained in 21 U.S.C. 841 for activities "authorized by this subchapter" (see 423 U.S. at 138-143), and petitioner was properly convicted for aiding and abetting Biscardi's violations of 21 U.S.C. 841(a)(1).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1979

⁵Petitioner does not contest Biscardi's liability under Section 841(a)(1), nor that he hired Biscardi, held him out to the public as a physician, and provided him with office space and prescription forms.